

FEDERAL ELECTION COMMISSION
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Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 4305

DATE COMPLAINT FILED: February 12, 1996
DATE OF NOTIFICATION TO RESPONDENTS: February 16, 1996
DATE ACTIVATED: July 19, 1996
STAFF MEMBER: Thomas J. Andersen

COMPLAINANT:

Charles J. Givens

RESPONDENTS:

Malcolm S. "Steve" Forbes, Jr.
Forbes, Inc.
Forbes Magazine
Forbes for President, Inc. and
Joseph A. Cannon, as treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 434(b)(2)(A)
2 U.S.C. § 441a(a)(7)(B)
2 U.S.C. § 441b(a)
2 U.S.C. § 441d
11 C.F.R. §§ 100.7, 100.8
11 C.F.R. § 109.1
11 C.F.R. § 114.1(a)(1)
11 C.F.R. § 114.9
11 C.F.R. § 116.3

INTERNAL REPORTS CHECKED:

FEC Indices/Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. GENERATION OF MATTER

This matter arises from a complaint filed with the Federal Election Commission (the "Commission") by Charles J. Givens on February 12, 1996. The complaint alleges that Forbes, Inc., Forbes Magazine ("Forbes") and Malcolm S. "Steve" Forbes, Jr. violated 2 U.S.C.

§ 441b(a) of the Federal Election Campaign Act of 1971, as amended (the "Act"), by respectively making and accepting corporate contributions with regard to commentaries written by Mr. Forbes and carried in *Forbes* during his candidacy for U.S. President.¹ The complaint also alleges that Forbes for President, Inc. (the "Forbes Committee", the "Committee") violated sections 434 and 441d of the Act by respectively failing to report the commentaries as contributions in-kind and failing to include appropriate disclaimers. A response has been submitted on behalf of Mr. Forbes, but none has been received from the other respondents.²

II. CENTRAL ISSUE AND BRIEF ANSWER

This matter raises the question of whether a corporation controlled by a federal candidate that publishes a widely circulated magazine of which the candidate is the editor-in-chief may donate space for the candidate to express his opinions on campaign issues in a regularly-featured commentary section of the magazine. The Office of General Counsel believes that it may not. Even if the candidate's commentary does not mention his candidacy and does not contain express advocacy or solicitations for contributions, he possesses the ability to control the magazine's circulation, content, and format by virtue of his majority ownership stake and his position as editor-in-chief, and his personal involvement in presenting his views on campaign issues closely associated with him should be considered for the purpose of influencing his election.

¹ The complaint requested that the Commission enjoin Mr. Forbes from continuing to publish the commentaries. We notified Complainant that the Commission will not grant his request at this time.

² Notification letters were sent to Mr. Forbes, Forbes, Inc. and the Forbes Committee. No letters have been returned; accordingly, it is the policy of this Office to assume that all of the letters were received and we have so informed counsel for Mr. Forbes.

Accordingly, the portions of any commentaries that discuss such issues should be viewed by the Commission as prohibited corporate contributions to the campaign.

III. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Act prohibits corporations from making a contribution or expenditure from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). *See also* 11 C.F.R. § 114.2(b), (c). Section 441b(a) also makes it unlawful for any candidate, political committee, or other person knowingly to accept or receive a contribution prohibited by section 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. For purposes of this provision, the term “contribution or expenditure” includes any direct or indirect payment, gift of money, services, or anything of value, to any candidate or campaign committee in connection with any federal election. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.1(a)(1). Expenditures made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” 2 U.S.C. § 441a(a)(7)(B). *See also* 11 C.F.R. § 109.1(c). This includes “any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast” of a communication. 11 C.F.R. § 109.1(b)(4)(i).

The Act does not, however, completely foreclose corporate involvement in federal elections. 2 U.S.C. § 431(9)(B)(i) specifically exempts from the definition of “expenditure” “any news story, commentary, or editorial distributed through the facilities of any broadcasting

station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” Commission regulations similarly exclude from the definitions of contribution and expenditure “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication” 11 C.F.R. §§ 100.7(b)(2), 100.8(b)(2). According to the legislative history of this “press exemption,” Congress intended to preserve the traditional role of the press with respect to campaigns: “[I]t is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. [The press exemption] assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974), *reprinted in FEC Legislative History of Federal Election Campaign Act Amendments of 1974*, 638 (1977). See *FEC v. Massachusetts Citizens for Life, Inc.* (“MCFL”), 479 U.S. 238, 250 (1986); *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981).

A series of tests may need to be applied before concluding that the activity in question falls within the press exemption. First, the entity involved in the activity must be a press entity as described in 2 U.S.C. § 431(9)(B)(i). See Advisory Opinions 1987-8, *Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 5890, 1980-109 (CCH ¶ 5556), 1980-90 (CCH ¶ 5538). See also *FEC v. Multimedia Cablevision, Inc.*, Civ. Action No. 94-1520-MLB, slip. op. at 6 (D. Kan. August 15, 1995), *appeal docketed*, Nos. 95-3280 and 3315 (10th Cir. Sept. 5, 1995) (referring to the need for a “qualified press entity” in applying the exemption).³

³ To determine whether a medium of communication fits one of the descriptions listed in section 431(9)(B)(i), the Commission has applied the definitions of “broadcaster,” “newspaper,” and “magazine

After applying the “qualified press entity” test, the Commission must determine whether the press entity is owned or controlled by any political party, political committee or candidate. The test is a straightforward inquiry into whether the complaint, response or other data available to the Commission suggest that a media entity is so owned or controlled. If the media entity is so owned or controlled, the press exemption extends only to the costs of “news stor[ies] (i) which represent . . . bona fide news account[s] communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which [are] part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area” 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii).

The Act and the Commission’s regulations distinguish a “news story” from a “commentary” or an “editorial.” The Act covers “news stor[ies], commentar[ies], or editorial[s],” so the press exemption will protect all such material where the candidate lacks ownership or control of the media entity, obviating the need for further inquiry. The provision in the regulations that applies where ownership or control exists, however, is specifically limited to “news stor[ies].” The Commission has explained that “[u]nlike news [stories], commentaries and editorials are intended to reflect the subjective views of the publisher or broadcaster. In the

or other periodical publication” in its Explanation and Justification of 11 C.F.R. §§ 110.13 and 114.4(e). Although those regulations deal with the sponsorship of candidate debates by news organizations, the definitions in the Explanation and Justification were explicitly drafted with the press exemption in mind. See Explanation and Justification of 11 C.F.R. §§ 110.13, 114.4(e), 44 Fed. Reg. 76,734 (1979). Newspapers are “publication[s] of general circulation produced on newsprint paper which appear[] at regular intervals (usually daily or weekly) and which [are] devoted primarily to the dissemination of news and editorial opinion to the general public,” and “which ordinarily derive their revenues from subscriptions or advertising” 44 Fed. Reg. at 76,735. Magazines and “other periodical publications” are “publication[s] in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, opinion and entertainment, whether of general or specialized interest. Only magazines and periodicals which ordinarily derive their income from subscriptions and advertising” are to be exempt. *Id.*

context of a political campaign, commentaries and editorials tend to be partisan in nature and to be disseminated for the purpose of influencing the outcome of an election.” Informational Letter 1976-29, CCH ¶ 6907. Accordingly, commentaries or editorials contained in candidate-owned or -controlled publications are *not* protected by the press exemption, and absent strong evidence to the contrary, a candidate will be presumed to have received a contribution in-kind to influence his or her election when the candidate’s “newspaper or radio station disseminates commentaries or editorials favorable to [the candidate] or unfavorable to [the candidate’s] opponent.” *Id.*

In addition to “favorable” or “unfavorable” commentaries or editorials appearing in a candidate-owned or -controlled press entity, the Commission has held that the financing of a communication to the general public that discusses or mentions a candidate in an election-related context and is coordinated with the candidate or his or her campaign is “for the purpose of influencing a federal election.” Advisory Opinion 1988-22, CCH ¶ 5932. *See also* Advisory Opinion 1983-12, CCH ¶ 5718. The Commission has explained that if “[s]tatements, comments or references regarding clearly identified candidates appear in [a publication] and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain ‘express advocacy’⁴ or solicitations

⁴ Under former regulation 11 C.F.R. § 109.1(b)(2), “expressly advocating” meant any communication that by its terms advocated the election or defeat of a candidate, including but not limited to the name of the candidate, or expressions such as “vote for,” “elect,” “support,” “cast your ballot for” and “Smith for Congress,” or “vote against,” “defeat,” or “reject.” The U.S. Supreme Court has determined that when a communication urges voters to vote for candidates who hold a certain position and identifies specific candidates who hold that position, such a message “is marginally less direct than ‘Vote for Smith’” but “goes beyond issue discussion to express electoral advocacy.” *MCFL*, 479 U.S. at 249. Moreover, speech is express advocacy under the Act if, “when read as a whole, and with limited reference to external events,” it is “susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). New regulations in effect October 5, 1995 expanded the prior regulatory definition to incorporate the holdings of *MCFL* and *Furgatch*. 11 C.F.R. § 100.22. *But see Maine Right*

for contributions, then the payment for allocable costs incurred in making the communications will constitute . . . in-kind contributions to the identified candidates.” Advisory Opinion 1988-22.⁵

If a publication *does* include communications that contain express advocacy or solicitations for contributions, such communications, “if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such other persons and authorized by such authorized political committee.” 2 U.S.C. § 441d(a)(1). All contributions to federal candidates, including contributions in-kind, must be reported by the candidates’ authorized committees according to the terms of 2 U.S.C. § 434.

B. Factual Background

According to Dun & Bradstreet reports (Attachment 1), Forbes, Inc. is a privately-held New York corporation primarily engaged in the business of magazine publishing. It lists nine divisions, among them the Forbes Division and Forbes Newspapers. See Attachment 1 at 3. The Forbes Division publishes *Forbes*, a biweekly magazine focusing on finance and investment founded in 1917, with a current circulation of over 777,000. Forbes Newspapers was acquired by Forbes, Inc. in 1985 and publishes 14 weekly newspapers with a total circulation of

to Life Comm., Inc. (“MRLC”) v. FEC, 914 F. Supp. 8 (D. Me. 1996), *aff’d per curiam*, No. 96-1532 (1st Cir. Oct. 18, 1996) (invalidating new 11 C.F.R. § 100.22(b)).

⁵ The Commission has also indicated in several other instances that the absence of solicitations for contributions or express advocacy will not preclude a determination that an activity is “campaign-related” when there is coordination with the candidate or the campaign. See Advisory Opinions 1992-6 (CCH ¶ 6043), 1992-5 (CCH ¶ 6049), 1990-5 (CCH ¶ 5982), 1988-27 (CCH ¶ 5934), 1986-37 (CCH ¶ 5875), 1986-26 (CCH ¶ 5866), 1984-13 (CCH ¶ 5759), 1983-12 (CCH ¶ 5718).

approximately 56,000.⁶ In February 1990, following the death of his father, Malcolm S. "Steve" Forbes, Jr. became the majority stockholder of Forbes, Inc., owning 51% of the company's capital stock. The remaining 49% is owned equally by the four other Forbes siblings.

Mr. Forbes is President and Chief Executive Officer of Forbes, Inc., and is Editor-in-Chief of *Forbes*. For several years, Mr. Forbes has written a column that appears to be featured in every issue of *Forbes*, entitled "Fact and Comment," with the byline "By Steve Forbes, Editor-in-Chief." It is usually two pages in length, subdivided into four to eight separate topic sections, and carried in the front part of the magazine.⁷ On November 2, 1995, Mr. Forbes took a leave of absence from Forbes, Inc. presumably to concentrate on his presidential campaign, but he continued to write his column in *Forbes*. See Attachment 1 at 1. Mr. Forbes filed a Statement of Candidacy as a candidate for the Republican nomination for the U.S. Presidency on September 22, 1995, and formally announced his candidacy on the same day. Attachment 2.

1. The Complaint

The complaint alleges that, after declaring his candidacy for President, Mr. Forbes used his editorials in *Forbes* "to test the waters of public opinion for his political ideas, to communicate information about himself and his political beliefs to thousands of potential voters,

⁶ This information was verified using the "Forbes Newspapers" Website and the *Gale Directory of Publications & Broadcast Media/1996*. The newspapers are as follows: *Somerset Messenger Gazette* (Somerville, N.J.), *The Chronicle* (Middlesex & Dunellen, N.J.), *South Plainfield (N.J.) Reporter*, *Warren-Wachtung (N.J.) Journal*, *Scotch Plains-Fanwood (N.J.) Press*, *Hills-Bedminster (N.J.) Press*, *Metuchen-Edison (N.J.) Review*, *Franklin (N.J.) Focus*, *Highland Park (N.J.) Herald*, *Westfield (N.J.) Record*, *Bound Brook (N.J.) Chronicle*, *Piscataway (N.J.) Review*, *Greenbrook-North Plainfield (N.J.) Journal*, and *Cranford (N.J.) Chronicle*.

⁷ All issues examined by this Office were over 100 pages in length, with Mr. Forbes's column located between pages 20 and 30.

and to promote the central themes of his presidential campaign.” Mr. Forbes allegedly “increased the dissemination of these political communications by republishing each editorial in fourteen Forbes, Inc. newspapers in New Jersey” The complaint claims that the Forbes Committee has not reimbursed Forbes, Inc., *Forbes*, or the New Jersey newspapers for the cost of publishing these editorials and has not reported them as contributions or expenditures.

Specifically, the complaint avers that, since announcing his candidacy, Mr. Forbes has “authored and published at least ten editorials addressing issues discussed by the candidates in this election cycle. For example, Mr. Forbes has repeatedly used [*Forbes*] to promote his central campaign theme, the flat tax.” In the “Fact and Comment” section appearing in the October 16, 1995 issue of *Forbes*, Mr. Forbes wrote: “The way to get the economy growing as it should is to enact the flat tax. That won’t happen until after the next election.” See Attachment 3 at 3. One week later, Mr. Forbes wrote in “Fact and Comment”:

The answer is to junk the current code and enact the flat tax. The resulting simplicity would enormously increase compliance, would remove the major sources of political corruption in Washington, would set off an economic boom because people could keep more of each dollar they earned, and would eliminate barriers to job-creating investments.

Forbes, October 23, 1995, p. 23. See Attachment 3 at 4. The complaint cites examples of Mr. Forbes promoting his positions on other campaign issues, (e.g. returning to the gold standard, abortion, Bosnia, and federal term limits -- see Attachment 3 at 2, 5-7) and provides copies of campaign statements and various newspaper articles describing his positions on these issues.⁸ See Attachments 2, 4 at 4-5.

⁸ The complete documents are available for review in the Office of General Counsel.

The complaint argues that “[b]y testing political ideas and repeating campaign rhetoric in his editorials, Mr. Forbes has clearly made direct reference to and promoted his candidacy,” conduct which complainant notes the Commission concluded was “campaign-related” in Advisory Opinion 1990-5. The editorials are allegedly “impermissible corporate contributions to and expenditures made on behalf of Forbes’ campaign,” constituting violations of 2 U.S.C. § 441b(a). Complainant also alleges that the Forbes Committee violated sections 434 and 441d by respectively failing to disclose such contributions and expenditures and failing to place appropriate disclaimers on the editorials.

2. The Response

In the response submitted on behalf of Mr. Forbes, two basic arguments are proffered to refute the charges in the complaint. First, the response urges the Commission to apply an “express advocacy standard” as articulated by courts that have interpreted the terms “contribution” and “expenditure” in the Act.⁹ From a “plain reading of the editorials in question, there are no ‘communications expressly advocating the nomination, election, or defeat of any candidate.’” According to the response, this is “a classic situation where a public figure continues to voice opinions pertaining to issues of a general nature and of a general interest to the world.” Second, the response claims that Advisory Opinion 1990-5 does not apply because its fact pattern is “dramatically different” from this matter. Mr. Forbes, unlike the candidate referred to in that Opinion, has been writing his commentary “for over 15 years, a time which was clearly prior to any inkling he may have had for his candidacy for federal office. The

⁹ The response cites the following cases for support: *Buckley v. Valeo*, 424 U.S. 1 (1976); *MCFL*, 479 U.S. 238; *Furgatch*, 807 F.2d 857; *MRLC*, 914 F. Supp. 8.

magazine is circulated worldwide to hundreds of thousands of people and its genesis was not the outgrowth of campaign-related activities.” The response does not address the allegation in the complaint that the commentaries in question were republished in fourteen Forbes Newspapers.

C. Analysis

As an initial matter, the press exemption does not appear to be available to Mr. Forbes or Forbes, Inc. because, although *Forbes* and the Forbes Newspapers are “qualified press entities,”¹⁰ they appear to be “owned or controlled” by Mr. Forbes by virtue of his 51% ownership of the corporation’s capital stock. Accordingly, the exemption would then extend only to the costs of “news stories,” as distinguished from “commentaries” or “editorials.” Although the title of Mr. Forbes’s column -- “Fact and Comment” -- does not conclusively establish its nature, a review of the ten columns attached to the complaint appears to confirm that it is used by Mr. Forbes to “voice [his] opinions” on a wide variety of topics, as admitted in the response. Each column contains Mr. Forbes’s personal views on all subjects addressed in that column.¹¹ See Attachment 3. The columns thus appear to constitute “commentaries,” and as such would not be covered by the press exemption because the publications in which they appeared are candidate-controlled. See 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii). However, the

¹⁰ In applying the “qualified press entity” test, see *supra* note 3, it appears that *Forbes* is published at regular intervals in bound form, contains news articles of specialized interest (financial news) and opinion, and derives its income from subscriptions (\$52/year or \$4/issue) and advertising. The Forbes Newspapers all appear to be published weekly on newsprint paper and “devoted primarily to the dissemination of news and editorial opinion to the general public.” *Id.* The Newspapers derive their income either from a combination of subscriptions and advertising or from advertising alone. *Id.*, *Gale Directory of Publications and Broadcast Media/1996*.

¹¹ The only exceptions are restaurant reviews contained in the column, which appear to be written by other *Forbes* employees.

central issue still remains: whether the column space devoted to Mr. Forbes's campaign themes is something of value donated by Forbes, Inc. for the purpose of influencing his election and therefore subject to the Act.

This Office concurs with the response that nothing in the attached columns appears to constitute express advocacy, and there appear to be no solicitations for contributions. As noted, however, the Commission has indicated that the absence of solicitations for contributions or express advocacy will not preclude a determination that an activity is "campaign-related" when there is coordination with the candidate or the campaign. Advisory Opinion 1990-5, while not dealing with an ongoing, longstanding publication, sets forth factors relevant to whether an activity is "campaign-related" when the press exemption does not apply and there is sufficient indicia of candidate or committee involvement in the creation and dissemination of a communication. The newsletter in that Opinion was owned and financed by the candidate but did not clearly identify the owner as a candidate and did not contain solicitations for contributions or express advocacy. The Commission nevertheless held that any edition of the newsletter would be deemed to be "campaign-related" and thus for the purpose of influencing the candidate's election if: "direct or indirect reference is made to the candidacy, campaign or qualifications for public office of [the candidate or his or her] opponent"; or reference is made "to [the candidate's] views on public policy issues, or those of [the candidate's] opponent, or [to any] issues raised in the campaign"; or "distribution of the newsletter is expanded . . . in any manner that . . . indicates [its] utilization as a campaign communication." *Id.*

The complaint suggests that Mr. Forbes has made "direct reference" to his candidacy by repeating his campaign themes in his magazine, but any such connection must be made in the

mind of the reader as the fact of his candidacy is not discernible solely from the communications. However, at least one of the Forbes Newspapers has prominently featured a news story on Mr. Forbes's campaign in the same issue that carried his column.¹² The first page of the September 27, 1995 edition of *The Hills-Bedminster (New Jersey) Press* contains a large photograph of Mr. Forbes announcing his candidacy followed by the headline "Forbes is running for president: GOP candidate presents 'A New Conservative Vision.'" Attachment 5 at 1-2. In his column on the fourth page of the same edition, Mr. Forbes comments on the "destructive[ness]" of the "high capital gains tax" (Attachment 5 at 5), which he had proposed to "zero out" in his candidacy announcement. See Attachment 2 at 2. Although the column itself does not refer to Mr. Forbes's candidacy, a quick glance at the newspaper's front page headline and photograph will make it clear to the reader that the author of the column (which also contains a small picture of Mr. Forbes) is also a presidential candidate.

Mr. Forbes appears to have repeatedly offered his opinions on campaign issues in his columns since becoming a presidential candidate. The primary example raised in the complaint is his promotion of the "flat tax" in at least two separate "Fact and Comment" columns. See Attachment 3 at 3-4. The flat tax is closely identified with Mr. Forbes; indeed, he has championed its enactment in previous columns and specifically mentioned it several times during

¹² The news story itself appears to be a "bona fide news account" and thus would be protected under the press exemption. See 11 C.F.R. §§ 100.7(b)(2)(i)-(ii), 100.8(b)(2)(i)-(ii).

The column appears to be excerpted from the "Fact and Comment" column that appeared in the September 25, 1995 edition of *Forbes*. The attachments to the complaint do not include any copies of the allegedly reprinted columns, and this Office has had limited success in securing copies of the various newspapers.

his formal candidacy announcement.¹³ See Attachment 2. News reports covering the Republican Presidential Primary Election regularly referred to Mr. Forbes's flat tax proposals, some even going so far as to label him "Mr. Flat Tax." See Attachment 4 at 6. Mr. Forbes has also discussed, both on the campaign trail and in *Forbes*, his positions on term limits, a gold standard, abortion, and U.S. involvement in Bosnia. See Attachment 3 at 2, 5-7; Attachment 4. If Mr. Forbes reprinted his "Fact and Comment" columns in all of the Forbes Newspapers after announcing his candidacy as alleged in the complaint, this may suggest utilization of these publications as campaign communications by increasing the distribution of the columns.

While Mr. Forbes may have written commentaries in past issues of *Forbes* that have been integrated into his campaign speeches and pronouncements, continued publication of his campaign themes since becoming a presidential candidate could be used to advance his candidacy.¹⁴ Also, although the distribution of *Forbes* may be "worldwide" as stated in the response, the vast majority of its readers presumably are located in the United States and are potential supporters of Mr. Forbes. His positions as CEO of Forbes, Inc. and editor-in-chief of *Forbes* and his controlling interest in the corporation's capital stock give him considerable power to control all aspects of the magazine, including its circulation, content and format. Mr. Forbes not only had complete control over the substance of his commentaries; he also apparently

¹³ A Westlaw search revealed that Mr. Forbes has commented favorably on the flat tax in his column at least ten times between 1982 and 1995. His candidacy announcement, approximately 2,800 words in length, mentions the word "tax[]" over 40 times, far more than any other issue, and most often in reference to the flat tax.

¹⁴ This Office notes that, unlike the newsletter in Advisory Opinion 1990-5, only the columns written by Mr. Forbes are alleged to be unlawful contributions, not the publication or issue in which they appeared.

controlled their dissemination.¹⁵ Accordingly, this Office believes that, without the protection of the press exemption, Mr. Forbes's use of his column to espouse his campaign positions constitutes a "campaign-related" activity.

The Commission has rarely confronted enforcement matters where a respondent media entity was not afforded the protection of the press exemption. In Matter Under Review 2268 (Epperson, *et al.*), the candidate owned the media entity in question and therefore could not avail himself of the exemption. He had purchased a radio station and, after becoming a candidate, had used its facilities to broadcast editorials in which he discussed his positions on such topics as tax reform and U.S. foreign policy. Even though his editorials apparently did not refer to his or his opponents' candidacies,¹⁶ and did not contain express advocacy or solicitations for contributions, a majority of the Commission still found reason to believe that the company that owned the radio station and the candidate's principal campaign committee respectively made and received corporate contributions in-kind with regard to the broadcast of the editorials. The respondents signed conciliation agreements containing admissions of the violation, with language describing the campaign-related editorials as a "thing of value" donated by the radio station to the committee. Similarly, campaign-related commentaries carried in *Forbes* are a "thing of value" to

¹⁵ After Mr. Forbes announced his candidacy, the masthead of *Forbes* began listing Timothy C. Forbes as "Acting Chief Executive Officer," although Malcolm S. "Steve" Forbes, Jr. was still listed as "President and Editor-in-Chief." With the exception of submitting his regularly-featured commentaries for publication, Mr. Forbes apparently absented himself from his day-to-day management activities at *Forbes* while devoting full attention to his campaign. See Attachment 1 at 1. The fact that Mr. Forbes was permitted to temporarily withdraw from his management duties at *Forbes* while still being provided with column space to air his political views is further evidence of an inappropriate benefit to his candidacy by his corporation.

¹⁶ The conciliation agreements noted that "[e]ach editorial twice identified [the respondent] as the broadcaster," but the broadcasts did not refer to the respondent *as a candidate*.

the Forbes Committee, as they provided an efficient and convenient means of disseminating Mr. Forbes's campaign positions to several hundred thousand potential voters. Because of the candidate's direct involvement in the creation and dissemination of the campaign-related communications, we conclude that an in-kind contribution occurred.

IV. CONCLUSION

Based on the foregoing, this Office recommends that the Commission find reason to believe that Forbes, Inc. and *Forbes* made in-kind corporate contributions to the Forbes Committee in violation of 2 U.S.C. § 441b(a), and that the Forbes Committee violated 2 U.S.C. § 441b(a) by accepting them. We also recommend that the Commission find reason to believe that the Committee violated 2 U.S.C. § 434(b)(2)(A) by failing to report them. However, since there appear to be no instances of express advocacy or solicitations for contributions, we recommend that the Commission find no reason to believe that the Committee violated the disclaimer requirements of 2 U.S.C. § 441d. Because Mr. Forbes was personally involved in creating and disseminating the commentaries that constituted the alleged contributions, this Office recommends that the Commission find reason to believe that Mr. Forbes, personally and as an officer of Forbes, Inc., violated 2 U.S.C. § 441b(a) by knowingly accepting and by consenting to unlawful contributions, respectively.


Attached for the Commission's approval is a subpoena aimed at discovering the extent of the alleged violations (e.g., which of the Forbes Newspapers published Mr. Forbes's opinions on campaign issues during his candidacy) and the value of the alleged contributions (e.g., the amount the relevant publications would charge for political advertising occupying the same space devoted to Mr. Forbes's campaign themes).

V. RECOMMENDATIONS

1. Find reason to believe that Forbes, Inc. and Forbes Magazine violated 2 U.S.C. § 441b(a).
2. Find reason to believe that Forbes for President, Inc. and Joseph A. Cannon, as treasurer, violated 2 U.S.C. § 441b(a).
3. Find reason to believe that Forbes for President, Inc. and Joseph A. Cannon, as treasurer, violated 2 U.S.C. § 434(b)(2)(A).
4. Find no reason to believe that Forbes for President, Inc. and Joseph A. Cannon, as treasurer, violated 2 U.S.C. § 441d.
5. Find reason to believe that Malcolm S. "Steve" Forbes, Jr. violated 2 U.S.C. § 441b(a).
6. Approve the attached proposed Factual and Legal Analyses (3).
7. Approve the attached proposed Subpoena for the Production of Documents and Order to Answer Interrogatories.
8. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

11/8/96
Date

BY: 
Lois G. Lerner
Associate General Counsel

Attachments:


1. Dun & Bradstreet excerpts
2. Mr. Forbes's Presidential Announcement
3. Excerpts of "Fact and Comment"
4. News reports discussing Mr. Forbes's campaign positions
5. Excerpts from *The Hills-Bradminster Press*, Sept. 27, 1995
6. Proposed Factual & Legal Analyses (3)
7. Proposed Subpoena for the Production of Documents and Order to Answer Interrogatories



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/BONNIE ROSS 
COMMISSION SECRETARY

DATE: NOVEMBER 14, 1996

SUBJECT: MUR 4305 - First General Counsel's Report dated 11/8/96.

The above-captioned document was circulated to the Commission
on Tuesday, November 12, 1996.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	—
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

This matter will be placed on the meeting agenda for
Tuesday, December 03, 1996.

Please notify us who will represent your Division before the Commission on this
matter.



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/BONNIE ROSS
COMMISSION SECRETARY

A handwritten signature, likely of Marjorie W. Emons or Bonnie Ross, is written in ink next to the "FROM:" line.

DATE: NOVEMBER 15, 1996

SUBJECT: MUR 4305 - First General Counsel's Report dated 11/8/96.

The above-captioned document was circulated to the Commission
on Tuesday, November 12, 1996.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

This matter will be placed on the meeting agenda for

Tuesday, December 03, 1996.

Please notify us who will represent your Division before the Commission on this matter.



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *[Signature]*

DATE: November 8, 1996

SUBJECT: MUR 4305-First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

72 Hour Tally Vote ☒
Sensitive ☒
Non-Sensitive ☐

24 Hour Tally Vote ☐
Sensitive ☐
Non-Sensitive ☐

24 Hour No Objection ☐
Sensitive ☐
Non-Sensitive ☐

Information ☐
Sensitive ☐
Non-Sensitive ☐

Other ☐

DISTRIBUTION

Compliance ☒

Audit Matters ☐

Litigation ☐

Closed Letters ☐

MUR ☐

DSP ☐

Status Sheets ☐

Advisory Opinions ☐

Other (See Distribution below)